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case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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ANQUAN WALTERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0611-CR-545
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable John F. Surbeck, Jr., Judge  
Cause No. 02D04-0603-FB-55

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**May 30, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Anquan Walters appeals his conviction for Robbery,<sup>1</sup> a class B felony. He presents the following restated issues for review:

1. Did the State present sufficient evidence to support the conviction?
2. Did the trial court abuse its discretion by denying Walters's motion for a continuance?

We affirm.

The facts favorable to the conviction<sup>2</sup> reveal that on June 11, 2005, Jamilah Young and her sister, Gwendolyn Young, lived in Fort Wayne, Indiana, at 4031 Avondale, about two blocks from an Arby's restaurant on East Rudisill. That morning, Jamilah's boyfriend, Zondra Lee, came to pick up Jamilah and Gwendolyn for breakfast. As he was pulling up, Lee saw Walters and spoke briefly with him. Walters eventually walked across the street to his cousin's house, and Lee left for breakfast with Jamilah, Gwendolyn, and Gwendolyn's boyfriend.

Later that morning around 10:00, one of the shift managers at Arby's, Angelique Croxton, was taking a break outside the restaurant when a man, wearing a mask and gloves, ran up to her with a gun. He appeared to be running from the direction of Avondale. The man put the gun to Croxton's side and ordered her inside, where he

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<sup>1</sup> Ind. Code Ann. § 35-42-5-1 (West 2004).

<sup>2</sup> We direct Walters to Ind. Appellate Rule 46(A)(6), which requires the statement of facts section in an appellant's brief to "describe the facts relevant to the issues presented for review". Walters's appellate statement is completely devoid of facts relevant to his sufficiency claim or his claim that the trial court abused its discretion in denying his motion for continuance. Although we could dismiss his appeal for flagrant violation of our appellate rules, we choose to exercise our discretion and address the issues presented. *See Smith v. State*, 610 N.E.2d 265 (Ind. Ct. App. 1993) *aff'd in relevant part*, 621 N.E.2d 325 (Ind. 1993).

gathered the restaurant's three other employees. With the gun still pointed at Croxton, he ordered her to open the safe and put its contents inside a brown plastic Ivy Tech bag. Croxton complied and then the gunman ordered her to empty the money from the cash registers into the bag. He ripped the phone from the wall before placing the other three employees into the walk-in cooler. The gunman had Croxton empty the cash register at the drive-through window into his bag. Croxton directed the gunman to flee using the back door, which was unlocked and would not sound an alarm. The man placed Croxton into the cooler with the other employees and then fled through the back door. Croxton waited about thirty seconds before opening the cooler. She then immediately ran across the street to the fire department to report the robbery.

The witnesses provided police with a general description of the robber (that is, an African-American male with a thin build and between 5'6" and 6' tall). Within ten minutes of the robbery dispatch, Fort Wayne Police Officer James Payne was driving down an alley and observed Walters exiting the unattached garage at 4031 Avondale. Walters fit the suspect's general description. The officer's attention was further drawn to Walters when Walters looked at Officer Payne "suspiciously and kind of hurried his way towards the front of the home." *Transcript* at 184. While Officer Payne circled around to the front of the house in his police vehicle, Lee and the others arrived home from breakfast. Lee and Jamilah approached the house, as Walters walked up to them from the side of the house and asked to use the restroom. They all went inside.

Very shortly thereafter, the police knocked on the door and asked everyone to come outside. Everyone came out immediately, except Walters who had to be called

twice. When he finally came out, Walters was wearing a pair of Gwendolyn's shoes that were much too small for his feet.<sup>3</sup> Walters informed Officer Payne that he did not have identification on him, but that his name was Contrell. Other officers on the scene, however, recognized Walters from an active warrants list. Walters was arrested and driven to the nearby Arby's. Though he fit the general characteristics of the masked robber, none of the witnesses could positively identify Walters.

A search of the garage at 4031 Avondale revealed further evidence. Officers first discovered two one-dollar bills on top of the hood of the car. Above the car in the rafters of the garage, police recovered the plastic Ivy Tech bag. Inside this bag was a money bag, which contained gloves and a black mask identical to the one used by the robber. There were rolls of quarters, dimes, and nickels inside the plastic bag. Police also recovered from the bag a broken money wrapper with Walter's fingerprint on it. Finally, inside Jamilah's house, the police found a handgun and a box of ammunition in a bedroom closet (near the bathroom used by Walters) that did not belong to any of the occupants of the house.

On March 28, 2006, the State charged Walters with class B felony robbery. Walters eventually requested a speedy trial, and the trial court set the trial for May 30, 2006. On May 1, Walters filed a witness list and notice of alibi, claiming that at the time of the commission of the alleged offense he was at 4044 Avondale. In support of his

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<sup>3</sup> Walters told a detective, who noticed the shoes were too small, that a family member had given them to him. It was later determined, however, that he had left his black Nike shoes inside a closet and put on Gwendolyn's blue and white Nike shoes to come outside. It is further important to note that some of the victims indicated the robber wore black Nike shoes.

alibi, Walters anticipated calling Kenyatta Carter and Tonya Carter as witnesses. After speaking with Tonya, defense counsel determined she was “not a competent alibi witness” because she was not present at 4044 Avondale at the time of the robbery. *Id.* at 5. Defense counsel was not able to locate Kenyatta, who had a warrant out for her arrest.

At the beginning of the scheduled bench trial, defense counsel asked for a continuance, per Walters’s request, in order to locate Kenyatta. Walters indicated that he would also like a continuance so that he (Walters, not defense counsel) could have an opportunity to review discovery materials. The court denied the request for a continuance. Following the presentation of evidence, the trial court found Walters guilty as charged and subsequently sentenced him to twenty years in prison. Walters now appeals. Additional facts will be presented below as necessary.

1.

Walters initially challenges the sufficiency of the evidence. He does not dispute that a robbery took place at Arby’s on the morning in question, that the items found in the garage were involved in the robbery, or that he placed the Ivy Tech bag and other evidence up in the rafters of the garage. He claims, however, that the evidence does not establish he was the perpetrator of the robbery.

Our standard of review for claims challenging the sufficiency of the evidence is well settled. We will not reweigh the evidence or judge witness credibility, and we will respect the fact finder’s exclusive province to weigh conflicting evidence. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). Considering only the evidence and the reasonable inferences supporting the conviction, our task is to decide whether there is substantial

evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* Further, a conviction may be based purely on circumstantial evidence. *Moore v. State*, 652 N.E.2d 53 (Ind. 1995). “On appeal, the circumstantial evidence need not overcome every reasonable hypothesis of innocence.” *Id.* at 55. It is enough if an inference reasonably tending to support the conviction can be drawn from the circumstantial evidence. *Moore v. State*, 652 N.E.2d 53.

In support of his sufficiency claim, Walters initially notes that none of the victims could positively identify him as the masked robber. He also directs us to minor inconsistencies between each witness’s description of the robber, such as the type and shade of the pants worn by the robber. Walters relies further on his own testimony that he was sitting on the porch at 4044 Avondale, across the street from Jamilah’s house, when he saw a man run between Jamilah’s and the neighbor’s house and drop a bag. Walters testified that he (Walters) picked up the bag and went into Jamilah’s garage. According to Walters, when he eventually discovered that the bag and its contents were evidence of a robbery, he called Lee and met Lee and Jamilah outside the house.

We reject Walters’s blatant request for us to reweigh the evidence. The evidence reveals that he not only fit the general physical description of the robber, but that he was seen within two blocks of the Arby’s prior to and shortly after the robbery. Within ten minutes of the police dispatch, Officer Payne observed Walters exiting the garage where numerous items involved in the robbery, including the mask, Ivy Tech bag, gloves, rolls of coins, and money bag, were ultimately found. In fact, Walters’s fingerprint was discovered on a broken money wrapper found in one of the bags. Upon seeing Officer

Payne, Walters immediately walked to the house and gained entrance with Lee and Jamilah. Walters then demonstrated consciousness of guilt by changing his shoes to alter his appearance, taking an extended period of time to exit the house upon the request of police, and giving a false name to police.

At trial, Walters attempted to explain away each piece of the mountain of circumstantial evidence against him. The trial court, however, found that Walters's explanation of how he came to be in possession of the items related to the robbery was "absolutely incredible" and "not worthy of belief for a second." *Transcript* at 284. We will not second-guess the trial court's credibility determination in this regard. Moreover, we observe that the trial court was fully aware of the minor discrepancies between each victim's description of the robber and his clothing. Despite the fact that none of the victims could identify Walters as the masked robber, none of them opined that Walters was not the robber and the circumstantial evidence presented by the State was sufficient to create a reasonable inference that he committed the robbery.

2.

Walters also challenges the denial of his day-of-trial motion for continuance. He claims the trial court abused its discretion by not granting a continuance to allow him more time to locate his alibi witness and to look through the discovery materials.

Ind. Code Ann. § 35-36-7-1 (West 2004), provides in relevant part as follows:

(a) A motion by a defendant to postpone a trial because of the absence of evidence may be made only on affidavit showing:

- (1) that the evidence is material;
- (2) that due diligence has been used to obtain the evidence; and
- (3) the location of the evidence.

(b) If a defendant's motion to postpone is because of the absence of a witness, the affidavit required under subsection (a) must:

- (1) show the name and address of the witness, if known;
- (2) indicate the probability of procuring the witness's testimony within a reasonable time;
- (3) show that the absence of the witness has not been procured by the act of the defendant;
- (4) state the facts to which the defendant believes the witness will testify, and include a statement that the defendant believes these facts to be true; and
- (5) state that the defendant is unable to prove the facts specified in accordance with subdivision (4) through the use of any other witness whose testimony can be as readily procured.

\* \* \*

(d) A defendant must file an affidavit for a continuance not later than five (5) days before the date set for trial. If a defendant fails to file an affidavit by this time, then he must establish, to the satisfaction of the court, that he is not at fault for failing to file the affidavit at an earlier date.

\* \* \*

In addition to not filing an affidavit, Walters has wholly failed to indicate, both at trial and now on appeal, the probability of procuring Kenyatta's testimony within a reasonable time.<sup>4</sup> *See* I.C. § 35-36-7-1(b)(2). As the trial court observed, the likelihood of locating Kenyatta within a reasonable time was slim, as the police department and the public defender's office had both "diligently searched" for her to no avail. *Transcript* at 9.

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<sup>4</sup> Defense counsel explained the attempts made to locate Kenyatta:

We have been looking since then for Ms. Keyatta [sic] Carter, the second listed alibi witness. Ms. Carter has a warrant for her arrest right now for, I believe a misdemeanor failure to appear. Ms. Barchak has been looking up to this last weekend. She went down again and spoke to Mr. Walters who gave her what he believed to be Ms. Carter's brother's telephone number. She called that number, it was not accurate. A male individual answered that telephone did not know Ms. Carter's brother, did not know Ms. Carter. [The Prosecutor] disclosed to me that Detective Gregory has also been looking for Keyatta [sic] Carter as to interview her about Mr. Walters' alibi. So Judge she's not here. We've not been able to obtain service on her.

*Transcript* at 5.



Further, the record reveals that Kenyatta had an active warrant out for her arrest, which gave her an incentive not to be found.

The denial of Walters's request for a continuance was not otherwise an abuse of discretion, and he has not established prejudice. *See Anderson v. State*, 466 N.E.2d 27, 32 (Ind. 1984) (the denial of a continuance not based on statutory grounds is within the trial court's discretion, and "[t]o overcome the court's ruling it must be shown that the denial prejudiced the defendant"). As set forth above, it was not likely that Walters would be able to procure Kenyatta's testimony even if he had been granted a continuance. Further, with respect to Walters's claim that he (Walters, not defense counsel) had not had enough time to review discovery materials, the trial court concluded, "I think there's been plenty of time to review discovery as necessary." *Transcript* at 10. Walters has not established otherwise.

Here, Walters requested a speedy trial, and the State prepared its case to meet his request. Seven civilian witnesses, who were missing either school or work, were present and ready to testify on the morning of the scheduled trial. Under the circumstances of this case, the trial court did not abuse its discretion in denying Walters's last-minute request for a continuance.

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.